

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3

4 JAVIER RAMIREZ-RIVERA,

5 Petitioner,

6 v.

7 THE UNITED STATES OF AMERICA, et
8 al.,

9 Respondents.

Case No. 2:19-cv-00542-APG-PAL

ORDER

10 Petitioner Javier Ramirez-Rivera has filed a reply to the response. ECF No. 12. I will stay
11 this action while Ramirez-Rivera pursues his administrative remedies.

12 Ramirez-Rivera is a Mexican citizen who entered the United States without authorization.
13 He is removable from the United States for that reason. Ramirez-Rivera also has two criminal
14 convictions that immigration authorities have ruled also make him removable from the United
15 States. *See* 8 U.S.C. § 1227(a)(2)(B)(i). One conviction is for misdemeanor possession of 30
16 grams or less of marijuana. The second conviction is for misdemeanor possession of drug
17 paraphernalia.

18 According to Ramirez-Rivera, he has a path to remaining in the United States. First, he
19 must obtain a ruling that the conviction for misdemeanor possession of drug paraphernalia is not a
20 removable offense. Second, he must obtain a waiver of the conviction of misdemeanor
21 possession of 30 grams or less of marijuana as a removable offense. *See* 8 U.S.C. § 1182(h).¹
22 Third, once those obstacles are set aside, he must obtain a favorable decision on the petitions to
23 adjust his status.

24 The Supreme Court has held that, under the categorical approach, a Kansas conviction for
25 possession of drug paraphernalia is not a removable offense. *Mellouli v. Lynch*, 130 S. Ct. 1980
26 (2015). The Ninth Circuit has held that, under the categorical approach, a Nevada conviction for

27 ¹ Alternatively, his conviction for misdemeanor possession of 30 grams or less of marijuana
28 might not be a removable offense. *See* 8 U.S.C. § 1227(a)(2)(B)(i).

1 possession of drug paraphernalia is not a removable offense. *Madrigal-Barcenas v. Lynch*, 797
2 F.3d 643 (9th Cir. 2015).² The Supreme Court in *Mellouli* described the categorical approach:

3 Because Congress predicated deportation “on convictions, not conduct,” the
4 approach looks to the statutory definition of the offense of conviction, not to the
5 particulars of an alien’s behavior. . . . The state conviction triggers removal only
6 if, by definition, the underlying crime falls within a category of removable
7 offenses defined by federal law. . . . An alien’s actual conduct is irrelevant to the
8 inquiry, as the adjudicator must “presume that the conviction rested upon nothing
9 more than the least of the acts criminalized” under the state statute.

10 *Mellouli*, 135 S. Ct. at 1986 (citations omitted). A conviction for possession of drug
11 paraphernalia in Kansas, as in *Mellouli*, or in Nevada, as in *Madrigal-Barcenas*, is not a
12 removable offense under the categorical approach because the state schedules of controlled
13 substances in both Kansas and Nevada list substances that the federal schedules of controlled
14 substances do not list. 135 S. Ct. at 1988, 797 F.3d at 645. Instead, the conviction for possession
15 of drug paraphernalia must have some connection to a drug listed in the federal schedule of
16 controlled substances. *Mellouli*, 135 S. Ct. at 1990-91.

17 *Mellouli* and *Madrigal-Barcenas* do not hold that no conviction for possession of drug
18 paraphernalia is a removable offense. Both *Mellouli* and *Madrigal-Barcenas* left open the
19 question whether a conviction for possession of drug paraphernalia could be a removable offense
20 under the modified categorical approach:

21 In such cases, “a court may determine which particular offense the noncitizen was
22 convicted of by examining the charging document and jury instructions, or in the
23 case of a guilty plea, the plea agreement, plea colloquy, or some comparable
24 judicial record of the factual basis for the plea.” . . . Off limits to the adjudicator,
25 however, is any inquiry into the particular facts of the case.

26 *Mellouli*, 135 S. Ct. at 1986 n.4 (citations omitted). The Ninth Circuit remanded its case to the
27 Board of Immigration Appeals for consideration whether the modified categorical approach
28 would apply to a Nevada drug-paraphernalia conviction. *Madrigal-Barcenas*, 797 F.3d at 645.

I do not have the necessary information to rule upon the potential application of the
modified categorical approach. Ramirez-Rivera did not attach any state-court documents of his

² For the purposes of removal, the Ninth Circuit found no material difference between the
Kansas statute at issue in *Mellouli* and Nevada’s statute at issue in *Madrigal-Barcenas*. 797 F.3d
at 645.

1 drug-paraphernalia case. Likewise, the respondents did not attach any of those documents to their
2 response.

3 Even if I had the necessary information rule under the modified categorical approach, and
4 even if I ruled in Ramirez-Rivera's favor, this would not be the end of his efforts to obtain relief
5 from removal. First, Ramirez-Rivera still would need to obtain a waiver of his marijuana-
6 possession conviction as a reason for removal. Second, the petitions to adjust his status still
7 would need to be approved.

8 I do not have jurisdiction to rule on those two issues. 8 U.S.C. § 1252(g). Ramirez-Rivera
9 would need to present those issues through the administrative process. Judicial review would
10 then occur through the procedures outlined in 8 U.S.C. § 1252. Habeas corpus is not part of those
11 procedures. Ramirez-Rivera must return to the Board of Immigration Appeals to obtain relief,
12 whether now or later.

13 Faced with a similar situation in *Madrigal-Barcenas*—a question whether the modified
14 categorical approach worked for a drug-paraphernalia conviction and a request for a cancellation
15 of removal—the Ninth Circuit remanded the case to the Board of Immigration Appeals. 797 F.3d
16 at 645. Remand is not possible in this case because this is a habeas corpus action, not a petition
17 for judicial review.

18 Under these circumstances, the respondents' suggestion—that I stay this action while
19 Ramirez-Rivera pursues his administrative remedies and judicial review—is the better approach.³
20 I will maintain the stay of removal of Ramirez-Rivera from the United States while he pursues his
21 administrative remedies and judicial review.

22 IT THEREFORE IS ORDERED that this action is **STAYED** while Ramirez-Rivera
23 presents his claim under *Mellouli v. Lynch*, 130 S. Ct. 1980 (2015), to the Board of Immigration
24 Appeals.

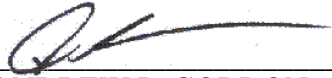
25 ³ I am not persuaded by Ramirez-Rivera's argument that he should not need to return to the
26 Board of Immigration Appeals. He states that the BIA had the opportunity to consider *Mellouli*
27 *sua sponte* in his January 23, 2018 motion to reconsider. ECF No. 12, at 2. However, in the
28 petition, Ramirez-Rivera alleges that prior counsel did not present the *Mellouli* issue to the BIA in
that motion to reconsider. ECF No. 1, at 10. I cannot call another attempt to reopen his
immigration case futile, because Ramirez-Rivera has not yet presented the *Mellouli* issue to BIA.

1 IT FURTHER IS ORDERED that the stay of deportation or removal of Ramirez-Rivera
2 from the United States, entered on April 5, 2019, will remain in effect pending further order of
3 this court.

4 IT FURTHER IS ORDERED that the prevailing party in the proceedings before the Board
5 of Immigration Appeals and any judicial review must file a motion to reopen and to lift the stay
6 of deportation or removal within 21 days of the conclusion of those proceedings. Further,
7 Ramirez-Rivera or the respondents may move to reopen the action and seek any relief appropriate
8 under the circumstances.

9 IT FURTHER IS ORDERED that the clerk of court shall administratively close this action
10 until such time as the court grants a motion to reopen the action.

11 DATED: April 22, 2019.

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14 ANDREW P. GORDON
15 United States District Judge
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